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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000491-001 DT 02/11/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA KENNETH M FLINT

v.

MARIE MCQUILLEN (001) CARI M MCCONEGHY-NOLAN

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–751–TR–2011–004628.

Defendant-Appellant Marie McQuillen (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence and two civil violations. Defendant contends certain actions of the prosecutor were fundamental error, that the trial court abused its discretion in certain evidentiary rulings, and that the State did not present sufficient evidence of her failure to drive in one lane. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On February 19, 2011, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1); failure to control speed to avoid a collision, A.R.S. § 28–701(A); and failure to drive in one lane, A.R.S. § 28–729(1). Trial in this matter began November 7, 2011, and concluded November 8, 2011. The transcript consists of two volumes, both of which contain matters from both days. The transcript that this Court will denominate as Volume I contains juror voir dire, jury instructions, opening statements, and closing arguments. The transcript that this Court will denominate as Volume II contains testimony from the witnesses.

After the trial court selected the jurors and gave them their preliminary instructions, the prosecutor made her opening statement. (R.T. of Nov. 7, 2011, Vol. I, at 101.) In discussing the witnesses who would testify, the prosecutor said the following of Officer Steel:

> . . . [H]e conducts a very specific field sobriety test when he suspects that someone might be impaired to operate a motor vehicle.

(R.T. of Nov. 7, 2011, Vol. I, at 104.) Defendant's attorney made no objection to that statement. Defendant's attorney then made his opening statement. (*Id*. at 107.)

The State's first witness was Ronnie McKnight, who was a cab driver for Arizona Discount Cab. (R.T. of Nov. 7, 2011, Vol. II, at 13.) He testified he was working on February 19, 2011, at about 11:00 p.m. when he saw a vehicle make a wide turn from Thomas onto 64th Street and hit a curb, which cause it to have two flat tires. (*Id*. at 14–19, 24, 31, 36.) As a result of this, he called 9-1-1. (*Id*. at 14.) Because the vehicle was stopped in the roadway and "pretty much in the bike lane," he suggested to the driver that she pull to the side of the road, which she did. (*Id*. at 24, 32–34, 47.) He said the vehicle could still move even though it now had two flat tires. (*Id*. at 35.) He stayed there until the police arrived, which was about 5 to 8 minutes later. (*Id*. at 20–21, 34, 51.) He told the officers what he saw and identified to them the driver of the vehicle. (*Id*. at 20–21, 34, 38.) He watched as the officers contacted the driver. (*Id*. at 24.) During that testimony, Defendant's attorney made several objections that the question was leading:

> Q Were you working in the area of 64th Street and Thomas here in Scottsdale just before 11:00 p.m. back on Saturday, February—
>
> MR. GOEBEL: Leading, Your Honor.
>
> THE COURT: Okay. Overruled.

(R.T. of Nov. 7, 2011, Vol. II, at 14.)

> Q. When you were there when the officers arrived, were you confident that they made contact with the person that you had called in about?
>
> A. Yeah.
>
> MR. GOEBEL: Leading, Your Honor.
>
> THE COURT: Overruled.

(R.T. of Nov. 7, 2011, Vol. II, at 21.)

> Q. And did you tell the officer that you observed her having poor balance as you were—when she got out of the car?
>
> A. Yeah.
>
> MR. GOEBEL: Leading, Your Honor.
>
> THE COURT: Okay. Overruled.

(R.T. of Nov. 7, 2011, Vol. II, at 22.) On cross-examination, Defendant's attorney asked Mr. McKnight if it had been cold that night, but Mr. McKnight did not remember. (*Id*. at 40.)

Officer Marcus Stanley testified he was on duty on February 19, 2011. (R.T. of Nov. 7, 2011, Vol. II, at 52–53.) At about 10:50 p.m., he was dispatched to the area of Thomas and 64th Street to investigate a disabled vehicle, and it took him about 5 minutes to get there. (*Id*. at 53–54, 57.) He observed a white Honda CRV with the passenger-side tires flat, and Defendant in the driver's seat, the keys in the ignition, and the motor running. (*Id*. at 55–56, 67, 69, 72.) He

noticed Defendant had bloodshot watery eyes and slurred speech, and had the odor of alcohol coming from her. (*Id*. at 58.) Officer Stanley gave the following testimony:

> Q. And what does [your report] indicate?
>
> A. Her speech was slow and slurred.
>
> Q. What do those things, based upon your experience and training, indicate to you?
>
> A. They're generally an implication [*sic*] of impairment.
>
> Q. Okay. Impairment due to?
>
> A. It can be due to alcohol, sometimes drugs.

(R.T. of Nov. 7, 2011, Vol. II, at 59.) Again, Defendant's attorney made no objection. On cross-examination, Defendant's attorney asked Officer Stanley if he remembered what the weather conditions were that night, but Officer Stanley did not remember. (Id. at 68.)

Officer Garcia testified he was on duty on February 19, 2011, and at about 10:50 p.m. was dispatched to the area of Thomas and 64th Street to investigate a disabled vehicle. (R.T. of Nov. 7, 2011, Vol. II, at 76.–78) He saw Officer Stanley contact the driver, so he spoke to a cab driver who was there. (*Id*. at 79.) When he spoke to the driver of the vehicle, whom he later identified as Defendant, she said did not know how the tires went flat. (*Id*. at 80, 103–04.) He noticed she had poor balance, bloodshot watery eyes, slurred speech, and a flushed face, and her movements were slower than he would expect. (*Id*. at 81–82.) On re-direct examination, the prosecutor asked the following questions, and defendant's attorney again objected that the questions were leading:

> Q. [D]o you make note of items in the car that might be important to the DUI—
>
> MR. GOEBEL: Leading, Your Honor.
>
> Q. BY MS. FULLER: —investigation?
>
> MR. GOEBEL: Objection; leading.
>
> MS. FULLER: It's a yes or no question.
>
> THE COURT: Okay. Overruled. You may answer.

(R.T. of Nov. 7, 2011, Vol. II, at 99–100.)

> Q. [D]o you make note of things in the vehicle that may have evidentiary value to this investigation?
>
> A. Yes.
>
> MR. GOEBEL: Leading.
>
> THE COURT: Okay. Overruled.

(R.T. of Nov. 7, 2011, Vol. II, at 100.)

The trial court then had played for the jurors the emergency call Defendant made to Triple A. (R.T. of Nov. 7, 2011, Vol. II, at 109.) Defendant told the operator she had two tires that blew, but said, "I don't understand why." (*Id*.) She said she could not believe what had happened, and said, "I don't know what happened." (*Id*. at 111–12.) Defendant said nothing about rain or wet road conditions. (*Id*. at 109–114.)

Officer Brian Steel testified he was on duty on February 19, 2011, when he was dispatched to investigate a disabled white four-door Honda. (R.T. of Nov. 7, 2011, Vol. II, at 115, 116–17.) He contacted Defendant, and observed there was significant damage to both passenger-side tires that appeared to be caused by hitting the curb. (*Id*. at 125–26.) He described Defendant as either leaning on or hanging onto her vehicle, and that she had a noticeable sway and could not stand in one position. (*Id*. at 126.) He noticed she had thick and slurred speech, bloodshot watery eyes, and an odor of alcohol. (*Id*. at 127.) The prosecutor asked the following question and received the following answer:

> Q. Okay. Now, as you're contacting her, these things you noticed about her, the odor of alcohol, the eyes and the—the speech, did you decide that you should—what did these things indicate to you?
>
> A. There were signs of alcohol consumption, obviously, and possible impairment by alcohol.

(R.T. of Nov. 7, 2011, Vol. II, at 128.) Again, Defendant's attorney made no objection. Officer Steel testified about the HGN test and the training he received, but made no statements about how accurate or reliable the test was. (*Id*. at 129–31.) Again, Defendant's attorney made no objection. The prosecutor asked the following question and received the following answer:

> Q. . . . What is NHTSA?
>
> A. NHTSA's the National Highway and Traffic Safety Administration. In the '70's, I don't know the exact years, but in the—the '70's, they got together and commissioned different groups. Their goals were to evaluate the field sobriety tests that were being used by officers, and then come up with more reliable tests for them to use. And then once they came up with more reliable tests, they wanted to standardize them so that all of the police officers across the country administering the tests were doing them in the same way and their—all of the impairment was being noted the same way.

(R.T. of Nov. 7, 2011, Vol. II, at 133.) Again, Defendant's attorney made no objection. Officer Steel later described administering the HGN test to Defendant, and observing all six of the six possible cues. (*Id*. at 138.) Officer Steel asked Defendant if she would submit to a blood test and advised her she would lose her driver's license if she refused, and she said she did not need a driver's license. (*Id*. at 143.) Based on Defendant's refusal to submit to a blood test, Officer Steel obtained a search warrant, and Defendant's blood was drawn at 12:02 a.m. pursuant to that warrant, which was within 2 hours of her driving. (*Id*. at 143–45, 152–53.) Officer Steel testified the reason he cited Defendant for failure to drive within one lane was her driving through the bicycle lane. (*Id*. at 160–61.)

On cross-examination, Defendant's attorney asked Officer Steel about the weather, and Officer Steel acknowledged it was 50 degrees at that time and it had rained earlier. (R.T. of Nov. 7, 2011, Vol. II, at 169.) Defendant's attorney asked Officer Steel if he would agree there is a higher propensity for there to be car accidents when it has been raining, and Officer Steel said he would not use the word "propensity," but acknowledged there are more accidents when the roads are wet. (*Id*. at 170.) Defendant's attorney asked Officer Steel whether he made either an audio or a video tape of this investigation, and Officer Steel said he did not. (*Id*. at 184.) Defendant's attorney asked the following questions and received the following answer:

> Q. BY MR. GOEBEL: Is—is there any visual recording equipment in the Scottsdale District 2 Precinct where you took her?
>
> A. The jail has recording.
>
> Q. So where she was at, you guys could have videotaped it; right?
>
> A. The entire thing is videotaped.
>
> Q. Are you going to present that evidence today?
>
> MS. FULLER: Objection, Your Honor. That's available to defense, as well. If he wants to present it, he's allowed to do so.
>
> THE COURT: Okay. The lawyers decide which—to present the evidence, not the witness.

(R.T. of Nov. 7, 2011, Vol. II, at 185.) Defendant's attorney made no further objection.

The State next presented Vincent Villene from the Scottsdale Crime Laboratory. (R.T. of Nov. 7, 2011, Vol. II, at 195.) He tested the sample of Defendant's blood, and test results showed she had a BAC of 0.186. (*Id*. at 199–212.) The prosecutor later asked the following question, and defendant's attorney objected that the question was leading:

> Q. All right. Now, would an individual who was driving a motor vehicle who struck the curb with their tires on one side of their car, would that be consistent with having difficulty operating a motor vehicle based on the use of alcohol?
>
> A. That—
>
> MR. GOEBEL: Leading, Your Honor.
>
> THE WITNESS: —could be an indication.
>
> THE COURT: Pardon?
>
> MR. GOEBEL: Leading.
>
> THE COURT: Overruled. You may answer.

(R.T. of Nov. 7, 2011, Vol. II, at 215.) After that testimony, the State rested. (*Id*. at 228.)

. . . .

. . . .

During the prosecutor's final argument, she said the following when discussing the cab driver, Mr. McKnight:

> That's—a civilian recognizing there's a problem, and then as he made contact with her and he told you he needed to call the police concerning what was happening with her on the roadway. That's significant. We don't even have police officers who are trained with respect to recognition of impairment going down the road way seeing her driving, this was a civilian who called it in.

(R.T. of Nov. 8, 2011, Vol. I, at 123.) Defendant's attorney made no objection. And in rebuttal, the prosecutor compared Mr. McKnight's lack of training with the officers' training:

> Mr. McKnight, civilian, not trained to recognize impaired drivers; nevertheless, recognized impaired driving, not only by the driving, but then ultimately when he observed her demeanor and said, you know, I backed off. She was just really getting agitated and I just backed off. I did not want to deal with her.
>
> When officers arrived on scene, they immediately recognized the odor of alcohol, her appearance, the bloodshot, watery eyes, the slurred slow speech.

(R.T. of Nov. 8, 2011, Vol. I, at 151.) Again, Defendant's attorney made no objection.

During Defendant's attorney's final argument, he noted Officer Steel "finally was able to testify that it was cold and that it had been raining that night." (R.T. of Nov. 8, 2011, Vol. I, at 133–34.) Defendant's attorney went on to state the following:

> . . . She said something went wrong with the car, the tires are flat, I'm not sure how. We know that it was raining, the streets are wet, it's dark, it's after 1000 o'clock, and the tires went flat. That's no evidence of her bad driving.

(R.T. of Nov. 8, 2011, Vol. I, at 135.) Defendant's attorney continued on this theme of rain: "[A]nd it's 50 degrees out and it had been raining." (*Id*. at 140.) "Now, [Officer Steel] said that it was 50 degrees, it had rained hard, and that there was significant damage to the tires that were completely deflated." (*Id*. at 143.) "All we know is that the tires got flat on a rainy night when people have more of a tendency to get in car accidents." (*Id*. at 144.) In her rebuttal, the prosecutor discussed how the evidence presented related to Defendant's attorney's argument about rain:

> And on the basis of that instruction alone, Mr. Goebel's list of what we do know absolutely becomes what we don't know. Let's start with his comment blaming everything to do with the rain on whatever happened to her tires. There was no testimony that this was a torrential downpour. I believe Officer Steel mentioned it was kind of a misty situation, and nobody mentioned that they were out doing this investigation in the pouring rain.

(R.T. of Nov. 8, 2011, Vol. I, at 146–47.) Again, Defendant's attorney made no objection.

The trial court found Defendant responsible for the failure to drive in one lane charge, and not responsible for the failure to control speed to avoid a collision charge. (R.T. of Nov. 8, 2011, Vol. II, at 253.) The jurors found Defendant guilty of the three DUI charges. (*Id*. at 255–56.) On December 1, 2011, the trial court imposed sentence. On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Has Defendant established the alleged errors amounted to fundamental error. (Defendant's Issues I, II, III, and V.)*

Defendant contends the prosecutor committed error on several occasions, but acknowledges Defendant's trial attorney did not object and thus Defendant must establish any error was fundamental. Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz,* 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). In the present case, this Court concludes Defendant has failed to establish error, and has further failed to establish she was prejudiced.

Defendant's first complaint is when the prosecutor stated in opening statement that Officer Steel conducts a very specific field sobriety test when he suspects that someone might be impaired. (R.T. of Nov. 7, 2011, Vol. I, at 104.) Officer Steel testified Defendant was either leaning on or hanging onto her vehicle, had a noticeable sway and could not stand in one position, had thick and slurred speech, had bloodshot watery eyes, and had an odor of alcohol, and admitted drinking alcohol. (R.T. of Nov. 7, 2011, Vol. II, at 126–27.) He said these were signs of alcohol consumption and possible alcohol impairment, so he conducted a DUI investigation, starting with a HGN test. (*Id*. at 128–29.) The prosecutor thus accurately characterized what the testimony would be. Defendant contends, however, this amounted to Officer Steel stating his opinion that Defendant was impaired. A review of the prosecutor's statement and Officer Steel's testimony was Officer Steel thought Defendant might be impaired, not that she was impaired. Thus, there was no error, much less fundamental error.

Defendant complains that Officer Stanley testified that Defendant's slow and slurred speech was generally an indication of impairment that could be due to alcohol and sometimes drugs. (R.T. of Nov. 7, 2011, Vol. II, at 59.) Again, this was Officer Stanley observation that Defendant could be impaired by alcohol and not an opinion that she was impaired.

Defendant contends Officer Steel testified the HGN test was reliable. A review of Officer Steel's testimony show he said the NHTSA attempted to "come up with more reliable tests." (R.T. of Nov. 7, 2011, Vol. II, at 133.) Thus, Officer Steel never gave an opinion that any particular test was or was not reliable.

Defendant contends the prosecutor somehow vouched for the reliability of the officers. (R.T. of Nov. 8, 2011, Vol. I, at 123, 151.) A review of those statements shows the prosecutor was merely stating Mr. McKnight had no training, while the officers had DUI training. Each of the officers testified they did receive DUI training. (R.T. of Nov. 7, 2011, Vol. II, at 53, 76–77, 115–16.) Again, the prosecutor accurately characterized the testimony later presented.

Defendant contends the prosecutor failed to comply with her duty under Rule 15 to disclose exculpatory evidence. There are two problems with this argument. First, Defendant's trial attorney never made an objection based on Rule 15. (R.T. of Nov. 7, 2011, Vol. II, at 185.) Thus, this Court has no way of knowing what the video tape showed. Second, because the record does not show what was depicted in that video tape, this Court has no way of knowing whether it was exculpatory. For all this Court knows, that video tape may have shown Defendant was impaired by alcohol, which would not have been exculpatory.

Finally, Defendant contends the prosecutor shifted the burden of proof to her. (R.T. of Nov. 8, 2011, Vol. I, at 146–47.) A review of the transcript shows Defendant's trial attorney first said "it had been raining that night," then said it had been "raining, the streets are wet," then said "it had been raining," and finally said, "it had rained hard." (R.T. of Nov. 8, 2011, Vol. I, at 134, 135, 140, 143.) The extent of the testimony about rain was Officers Steel's "Yes" answer to Defendant's trial attorney's question, "And, but it had rained earlier, right?" (R.T. of Nov. 7, 2011, Vol. II, at 169.) Thus, there was no testimony either that it had "rained hard" of that "the streets are wet." In response, the prosecutor said the following:

> There was no testimony that this was a torrential downpour. I believe Officer Steel mentioned it was kind of a misty situation, and nobody mentioned that they were out doing this investigation in the pouring rain.

(R.T. of Nov. 8, 2011, Vol. I, at 146–47.) The prosecutor therefore correctly characterized the lack of evidence of a hard rain or wet streets. Moreover, the Arizona Supreme Court has said the following:

> Furthermore, prosecutors have wide latitude in presenting their closing arguments to the jury: "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury."

State v. Jones, 197 Ariz. 290, 4 P.3d 345, ¶ 37 (2000), *quoting State v. Gonzales*, 105 Ariz. 434, 436–37, 466 P.2d 388, 390–91 (1970). It thus appears the prosecutor's argument was within permissible bounds.

. . . .

. . . .

B. *Did the trial court abuse its discretion in determining the prosecutor's questions were not leading. (Defendant's Issues IV and V.)*

Defendant contends the trial court abused its discretion in determining the prosecutor's questions were not leading. A leading question is one that suggests an answer, not one whose answer is obvious. *State v. McKinney*, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, "Did you see at any time Mike Hedlund's rifle?" was not leading question); *State v. McKinney*, 185 Ariz.567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, "[D]id [defendant] appear to be slightly more aggressive towards you or Chris?" was not leading); *State v. Agnew*, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court held "Had you known that the trust was not insured would you have invested?" was not leading question). For each question the prosecutor asked, the answer may have been obvious, but it was not one that suggested an answer. The trial court did not abuse its discretion in determining the questions were not leading.

C. *Did the State present sufficient evidence that Defendant failed to drive in one lane. (Defendant's Issue VI.)*

Defendant contends the State failed to present sufficient evidence that she failed to drive in one lane. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

> We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). In the present case, Mr. McKnight testified that Defendant made a wide turn, hit the curb, and came to rest in the bicycle lane. This was sufficient evidence for the trial court to find that Defendant did not stay in her lane in the roadway.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) Defendant has failed to establish fundamental error, (2) the trial court did not abuse its discretion in its evidentiary rulings, and (3) the State presented sufficient evidence to support the conviction.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN, JUDGE OF THE SUPERIOR COURT